

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

GARY HAGAN,  Appellant,  vs.  CIVIL SERVICE COMMISSION OF THE CITY OF DES MOINES, IOWA,  Appellee.	CASE NO. CVCV009175    <b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR ENTRY OF JUDGMENT</b>
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This matter came on for trial before the court beginning on January 23, 2013. The trial concluded on January 25, 2013 with closing arguments by counsel. Following completion of the trial, the parties were permitted to submit proposed findings of fact and conclusions of law. The parties, after the proceedings were transcribed, submitted written proposed findings of fact and conclusions of law on March 5, 2013.<sup>1</sup> As of that date the court deemed the matter fully submitted. Having reviewed the evidence as well as having considered the parties' submissions and arguments, the Court enters the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. This matter involves events that occurred on March 18, 2011. As of that day, Appellant Gary Hagan ("Hagan") was employed by the City of Des Moines ("City") where he began his employment in 2001. In February 2003, Hagan became the Marketing Coordinator working at the Des Moines International Airport ("Airport") and held this position on March 18, 2011.

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<sup>1</sup> The court notes that counsel utilized the transcript in their proposed findings and did an exceptional job in presenting their positions to the court with accurate citation to the record. These efforts by counsel are appreciated by the court.

2. During his tenure as marketing coordinator, the Airport was a department of the City and Airport personnel were City employees. On March 18, 2011 Roy Criss was Hagan's supervisor.

3. As marketing coordinator, Hagan performed a variety of tasks. He worked with vendors and potential advertisers; he worked with the press on stories about the Airport; he wrote various Airport newsletters and reports; he maintained the Airport's website; he responded to questions and complaints received through the website; and he otherwise assisted in marketing the Airport.

4. The job description for the Marketing Coordinator position indicates that the general duties of this position include: "Facilitates public information, data collection, and marketing/promotions programs to increase public knowledge and awareness of services and development efforts, for various City of Des Moines departments, facilities and special events as necessary." One feature of the job is that "[t]he nature of the work performed requires that employees in this class establish and maintain effective working relationships with other City employees and the public." Another feature is that a marketing coordinator "[m]ay be responsible for recruitment, training, scheduling, and directing the work of volunteers, part-time staff, or interns." The position also requires the "[a]bility to establish and maintain effective-working relationships with customers, community groups, contributors, volunteers, employees, and local media personnel."<sup>2</sup>

5. In his position, Hagan had "unescorted access authority." This authority permitted Hagan to be in certain secured areas of the Airport without escort. One of the secured areas in the Airport included the sterile area. The sterile area is considered the most secure

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<sup>2</sup> Joint Exhibit 3 at 1-2

portion of the Airport. Persons are not normally allowed in this area without first being screened by Transportation Security Administration (“TSA”) personnel.

6. As of March 18, 2011 Hagan had a good employment history with the Airport. Prior to March 18, 2011 he had only one disciplinary event on his performance record which involved a person who complained that Hagan’s email response to her was improper. Roy Criss disciplined Hagan for that event and no further incidents occurred.

7. Hagan had no prior disciplinary action regarding involving any violation of a security privilege or measure at the Airport.

8. Hagan was described as an employee who was helpful to others. His evaluations from 2006 and 2007 rated him as outstanding in the area of Relationships with People. His 2006 evaluation noted that: “Gary is extremely willing to be helpful to Airport tenants and the general public. This was a very critical part of his position as he has been the primary person responding to customer comments and complaints.”<sup>3</sup>

9. As marketing coordinator one of his duties was to provide escort services to persons having a need to be in secure areas of the Airport including the sterile area. Persons escorted might include contractors, maintenance personnel, vendors, advertisers, dignitaries, the media, and tour groups. Examples of escorts could be a potential advertiser examining the sterile area to allow them to decide whether they wished to purchase advertising space, giving tours of the sterile area to volunteers or school children, and escorting media personnel into the sterile areas to attend a press conference or interview passengers. The escorted individuals sometimes proceeded through the TSA screening checkpoint where they were screened, and other times the individuals did not proceed through the screening checkpoint and not screened. Individuals not

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<sup>3</sup> Joint Exhibit 13 at 1

screened included contractors with tools and media personnel with cameras. Hagan would escort approximately once a month.

10. On March 18, 2011 Hagan was confronted with a situation not previously encountered by him. On that day, a passenger by the name of Bryon Mason (“Mason”) came to the Airport intending to board a flight out of Des Moines on a plane operated by Allegiant Airlines (“Allegiant”). Mason testified when he approached the Allegiant ticket counter, the Allegiant ticket agent was in the process of assisting two other customers in front of him. Mason testified when the agent finished assisting the other customers, the agent then left the counter without assisting Mason. When the agent left Mason sought assistance from others at the Airport to no avail and eventually went to the information desk located on the first floor of the Airport.

11. The information clerk, in an attempt to assist Mason, contacted the marketing department at the Airport. Hagan took the call that morning.

12. Hagan testified when he received the call from the information desk, the clerk advised Hagan there was a passenger who had been unable to get a boarding pass for a particular flight and who was indicating he needed to be on the flight. After some discussion, Hagan proceeded to the information desk.

13. As Hagan was leaving his office to proceed to the information desk, Hagan spoke with his supervisor, Roy Criss (“Criss”). Criss suggested to Hagan the passenger could use either an airport kiosk or a smart phone to get a boarding pass.<sup>4</sup> Criss also reminded Hagan of the talking points airport personnel always have to tell a passenger in a situation similar to

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<sup>4</sup> Evidence established that Mason, attempted to obtain his boarding pass at the kiosk before approaching the Allegiant ticket counter but learned that Allegiant did not issue boarding passes from the kiosk.

Mason's. Those talking points were (1) the passenger would have to go through security; (2) that meant the passenger had to have a boarding pass and (3) the only people who could give the passenger a boarding pass were the people who worked for the airline on which the passenger was intending to fly.

14. When he arrived at the information desk, Hagan found Mason, who he was acquainted with through church. Mason explained again that he had been unable to get a boarding pass at the Allegiant counter. Hagan made additional attempts to contact Allegiant, but was unsuccessful. Hagan decided to escort Mason to the Allegiant boarding gate in an attempt to obtain a boarding pass for him. Hagan knew that this would mean taking Mason into the sterile area of the Airport. He also knew his security badge authorized him to escort individuals into this area. As such, he planned to escort Mason to the gate, get the boarding pass, and then take him back to the security checkpoint to be screened. Hagan explained to Mason that this is what they would do and that while being escorted, Mason must closely follow all instructions given by Hagan. Mason indicated that Hagan was very businesslike in his instructions and he knew this was important.

15. Hagan escorted Mason to Allegiant's gate. The parties introduced surveillance footage from the Airport on that date.<sup>5</sup> In the first segment the footage shows Hagan and Mason walking together on the outside of the Airport terminal. No violation of any regulations was found during this segment.

16. In the second segment Hagan and Mason exit an elevator in the sterile area and proceed to the Allegiant gate. The footage also shows a TSA employee walking in a direction

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<sup>5</sup> Joint Exhibit 16 (the footage contained no audio)

away from Hagan and Mason and then later running in the direction they were going. No violation of any regulation was found during this segment.

17. The third segment is at the Allegiant gate. Hagan and Mason enter the gate area. Mason is walking behind Hagan and enters the scene about 3 seconds after Hagan. Hagan motions Mason to stop and stand. Hagan walked to the Allegiant ticket agent about 8-10 feet further from where he directed Mason to stand. During this time Hagan's back is to Mason. There are passengers waiting to board the flight within a few feet of Mason. Some of the passengers are standing in a line which segregated them by stanchions and a belt from Mason and other passengers standing about 3-5 feet from Mason. The passengers in the line are probably 3-4 feet from Mason. During this footage two TSA agents enter the area and walk between the wall and Mason. During this segment the Allegiant agent provides Mason his boarding pass and everyone leaves the area. The violations with which Hagan was charged occurred during this segment.

18. After the escort, Hagan returned to his office where he discussed the events with Criss. Hagan informed Criss he believed this was an escort event.

19. While Hagan and Criss were discussing the events, TSA convened a 'Red Bridge' teleconference designed to bring all of the parties with information and decision making authority together to discuss the incident. Hagan, Criss, the Airport's Deputy Aviation Director for Airside Operations, Ken McCoy ("McCoy") and others were present in person while several individuals including Federal Security Director Jay Brainard ("Brainard") and the Allegiant pilot were present by phone. During the teleconference, Hagan explained the situation he had encountered, the actions he had taken, and why he had done so. After some discussion, Brainard ordered that the passengers from the plane Mason intended to board, who by that time had

boarded the plane, be taken off the plane, rescreened through the security checkpoint, and then allowed to re-board the plane.

20. Later on March 18, 2011, after the Red Bridge call, Hagan met with McCoy and Donald Smithey (“Smithey”), Executive Director of the Airport. Mike Ziino, a representative from Hagan’s employee union, attended this meeting with Hagan. During this meeting, Hagan explained his actions and what occurred. At the conclusion of the meeting, Hagan was suspended with pay pending an investigation of the incident by the Airport.

21. The Airport initiated an investigation into the March 18, 2011 event after the meeting with Smithey. The Airport’s investigation was conducted by McCoy as senior investigator who in turn shared his findings with Smithey.<sup>6</sup> Based on its investigation, the Airport concluded Hagan had violated federal regulations as well as local Airport rules when he escorted Mason on March 18, 2011. On May 3, 2011, a pre-disciplinary hearing was held in which Hagan was given another opportunity to explain the situation. Hagan’s union president as well as the union’s attorney were in attendance at this hearing. On June 28, 2011, Smithey communicated to Hagan by letter that he was terminated.<sup>7</sup>

22. Smithey consulted with Criss regarding possible disciplinary actions he could take. Smithey outlined three options he was considering. They included: 1) reinstating Hagan back to work with limitations, 2) reinstating him but placing him in a position elsewhere in the City system or 3) termination. Criss informed Smithey that his preference was for option 1 or 2 not termination.

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<sup>6</sup> If a written report detailing McCoy’s findings was prepared it was not submitted to the court.

<sup>7</sup> Joint Exhibit 15 at 1

23. Smithey's decision to terminate Hagan was based upon his determination that Hagan showed poor judgment, inconvenienced the Airport's passengers, compromised airport security and the safety of the general public.<sup>8</sup>

24. In its specification of charges the City alleged Hagan had decided to escort Mason around the security checkpoint based on Hagan knowing Mason from church and Hagan's belief Mason was not a security threat.<sup>9</sup> The second allegation concerned the fact that while escorting Mason, Hagan had turned his back on Mason.<sup>10</sup> The City alleged both actions violated long-standing security measures and resulted in a substantial disruption of service of Airport operations, TSA operations and various flights.<sup>11</sup>

25. At the time of his termination, Hagan was employed by the City, and as a result was entitled to appeal his termination to the Des Moines Civil Service Commission ("Commission") pursuant to Iowa Code section 400.20.<sup>12</sup> Following a hearing, the Commission upheld Hagan's termination.<sup>13</sup> Hagan then initiated an appeal to this court pursuant to Iowa Code section 400.27.

26. While the Airport conducted its investigation, TSA commenced a review of the actions of Hagan and the Airport. It appears that by April 20, 2011, TSA determined that the matter was closed with regards to the Airport and that no action would be taken against the

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<sup>8</sup> Joint Exhibit 15 at 1

<sup>9</sup> Joint Exhibit 2 at ¶ 10

<sup>10</sup> Joint Exhibit 2 at ¶ 8

<sup>11</sup> Joint Exhibit 2 at ¶ 16

<sup>12</sup> Iowa Code § 400.20 (2013); Joint Exhibit 1

<sup>13</sup> *In the Matter of the Appeal of Gary Hagan*, Ruling and Decision at 2 (Des Moines Civil Service Commission April 17, 2012) (filed as part of Commission's appearance in the case)



Airport.<sup>14</sup> On December 28, 2011, TSA notified Hagan that it would only issue a warning and would seek no other penalty.<sup>15</sup> This was the mildest penalty that TSA could impose.

27. In defense of his actions, Hagan relied on his unescorted access authority. Hagan testified that in the escort training he received from the Airport concerning proper escort procedure, no distinction was made between escorting passengers and non-passengers. Hagan testified he therefore saw no difference in escorting Mason as compared to any of the prior escorts he had done. Criss, Hagan's supervisor, likewise, told McCoy during the Airport's investigation of the incident that the escort training did not differentiate between passengers and non-passengers.

28. Airport personnel who are provided unescorted access authority undergo training initially and recurrently. Hagan received his initial training in 2003 and received recurrent training each year thereafter. His last recurrent training was in July 2010. In the 2010 recurrent training Hagan received, the training slide instructed that:

ESCORT means to accompany or supervise an individual who does not have 'unescorted access authority' to areas restricted for security purposes. You must remain within sight and sound of the person you are escorting, continuously monitoring them at all times, within the SIDA.<sup>16</sup>

The last sentence contains the "sight and sound" standard. There was no additional instruction as to what was required or what this meant under this standard. This standard was developed by the

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<sup>14</sup> Joint Exhibit 11 at 5 (For reasons unknown, TSA did not provide notice of this determination to the Airport until January 2012.)

<sup>15</sup> Joint Exhibit 17

<sup>16</sup> Joint Exhibit 9 at 3 (The SIDA is the Security Identification Display Area and consists of areas of the Airport where individuals are required to display their security badge or be escorted by someone with a security badge.)

Airport to explain the federal regulation. It does not appear in the federal regulation.<sup>17</sup> Hagan was aware of this standard from his training.

29. The training slides from the 2010 recurrent training did not distinguish between passengers and non-passengers. The initial training materials that Mr. Hagan received in 2003 were not presented to the court and there was no testimony that these materials contradicted the information in the 2010 recurrent training slides.

30. The parties admitted Joint Exhibits 8 and 18 which were security training slides for individuals at the Airport. These training slides were not part of Hagan's training.

31. The evidence established that the "sight and sound" standard did not require the escorting person to have his eyes affixed on the person being escorted at all times.

32. The Airport had a number of local rules that Airport personnel were to follow when escorting individuals titled Compiled Airport Board Regulations. Rule 3-4 was discussed. This rule was in effect on March 18, 2011 and stated:

- (a) No person shall fail to stop and submit to screening of his or her person and property in accordance with federal requirements for the security screening checkpoint before entering the sterile area beyond the security screening checkpoint. If a person does not consent to such screening, the person shall not be permitted entry past the security screening checkpoint.<sup>18</sup>

33. The Airport later adopted a new set of rules: the Des Moines Airport Authority Rules and Regulations.<sup>19</sup> These rules became effective on November 1, 2011.<sup>20</sup> The new rules contained rule 7-13 "Screening Point Restrictions" that contains

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<sup>17</sup> 49 C.F.R. § 1540.5

<sup>18</sup> Joint Exhibit 6 at 32

<sup>19</sup> Joint Exhibit 26

<sup>20</sup> Joint Exhibit 26 at 1

language identical to rule 3-4 of the Compiled Airport Board Regulations.<sup>21</sup> They also contained new rule 7-5 “Sterile Area Escort” which stated in part:

- (a) No person intending to board a commercial passenger air carrier flight subject to federal screening requirements may be escorted into the sterile boarding area unless otherwise allowed by federal law.<sup>22</sup>

34. Rule 7-5 was not in effect on March 18, 2011.

35. The Commission, at trial specifically identified and argued that Hagan violated 49

C.F.R. section 1540.105 which provides, in part, as follows:

Security responsibilities of employees and other persons:

- (a) No person may:

- (1) Tamper or interfere with, compromise, modify, attempt to circumvent, or cause a person to tamper or interfere with, compromise, modify, or attempt to circumvent any security system, measure, or procedure implemented under this subchapter.

- (2) Enter, or be present within, a secured area, AOA, SIDA or sterile area without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such areas.<sup>23</sup>

36. This violation occurred, according to the Commission, when Hagan escorted Mason around the security checkpoint and to the Allegiant gate to obtain the boarding pass.

37. The Commission, at trial specifically identified and argued that Hagan violated the escort regulation found at 49 C.F.R. section 1542.211(e) and the Airport’s “sight and sound” standard.<sup>24</sup> The federal regulation provides, in part:

- (e) Escorting. Each airport operator must establish and implement procedures for escorting individuals who do not have unescorted access authority to a secured area or SIDA that—

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<sup>21</sup> Compare Joint Exhibit 26 at 32 with Joint Exhibit 6 at 32

<sup>22</sup> Joint Exhibit 26 at 29

<sup>23</sup> Joint Exhibit 19 at 3

<sup>24</sup> Joint Exhibit 19 at 9; Joint Exhibit 9 at 3

- (2) Ensure that the escorted individuals are continuously accompanied or monitored while within the secured area or SIDA in a manner sufficient to identify whether the escorted individual is engaged in activities other than those for which escorted access was granted, and to take action in accordance with the airport security program;

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- (5) Ensure that individuals escorted into a sterile area without being screened under § 1544.201 of this chapter remain under escort until they exit the sterile area, or submit to screening pursuant to § 1544.201 or § 1546.201 of this chapter.<sup>25</sup>

38. The federal regulation provides that: “[e]scort means to accompany or monitor the activities of an individual who does not have unescorted access authority into or within a secured area or SIDA.”<sup>26</sup>

39. “Person means an individual, corporation, company, association, firm, partnership, society, joint-stock company, or governmental authority. It includes a trustee, receiver, assignee, successor, or similar representative of any of them.”<sup>27</sup>

40. “Secured area means a portion of an airport, specified in the airport security program, in which certain security measures specified in part 1542 of this chapter are carried out. This area is where aircraft operators and foreign air carriers that have a security program under part 1544 or 1546 of this chapter enplane and deplane passengers and sort and load baggage and any adjacent areas that are not separated by adequate security measures.”<sup>28</sup>

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<sup>25</sup> 49 C.F.R. § 1542.211(e)(2 & 5)

<sup>26</sup> 49 C.F.R. § 1540.5

<sup>27</sup> 49 C.F.R. § 1500.3

<sup>28</sup> 49 C.F.R. § 1540.5

41. “Security Identification Display Area (SIDA) means a portion of an airport, specified in the airport security program, in which security measures specified in this part are carried out. This area includes the secured area and may include other areas of the airport.”<sup>29</sup>

42. “Sterile area means a portion of an airport defined in the airport security program that provides passengers access to boarding aircraft and to which the access generally is controlled by TSA, or by an aircraft operator under part 1544 of this chapter or a foreign air carrier under part 1546 of this chapter, through the screening of persons and property.”<sup>30</sup>

43. “Unescorted access authority means the authority granted by an airport operator, an aircraft operator, foreign air carrier, or airport tenant under part 1542, 1544, or 1546 of this chapter, to individuals to gain entry to, and be present without an escort in, secured areas and SIDA's of airports.”<sup>31</sup>

### **CONCLUSIONS OF LAW**

This case is on appeal to this court after an appeal from a decision of the Commission of the City. As a civil service appeal, this matter is governed by the rules and case law interpreting chapter 400 of the Iowa Code. Iowa Code sections 400.18 through 400.27 provide the procedure for civil service proceedings.

In a civil service proceeding, the burden is always on the Commission to show that its action to terminate an employee was justified.<sup>32</sup> Iowa Code section 400.19 provides that a city “may peremptorily suspend, demote, or discharge a subordinate then under the person’s or

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<sup>29</sup> 49 C.F.R. § 1540.5

<sup>30</sup> 49 C.F.R. § 1540.5

<sup>31</sup> 49 C.F.R. § 1540.5

<sup>32</sup> *Lewis v. Civil Serv. Comm’n of Ames*, 776 N.W.2d 859, 862 (Iowa 2010); *Johnson v. Civil Serv. Comm’n of Clinton*, 352 N.W.2d 252, 256-57 (Iowa 1984) (citing E. McQuillin, *The Law of Municipal Corporations*, § 12.261(c) (3d ed. 1979) (“The burden of proving the incompetency or misconduct of the officer or employee sought to be removed is on the one alleging it.”)).

chief's direction for neglect of duty, disobedience of orders, misconduct, or failure to properly perform the subordinate's duties." In determining whether misconduct occurred, the court can look to the rules and code of conduct for guidance.<sup>33</sup> If the city takes an adverse employment action against an employee, the employee may appeal to the civil service commission under section 400.20.

Upon appeal, the employer submits to the civil service commission a specification of charges of the grounds on which the action was based.<sup>34</sup> A hearing is held by the civil service commission which decides whether the employer's action was appropriate. After the civil service commission decision, either party may appeal the decision to the district court.<sup>35</sup> "The district court of the county in which the city is located shall have full jurisdiction of the appeal and the said appeal shall be a trial de novo as an equitable action in the district court."<sup>36</sup> As such, the district court should not give any weight to the prior civil service ruling.<sup>37</sup> Review is "limited to the specification of charges made to the commission pursuant to section 400.22."<sup>38</sup> On appeal the district court is limited in its action by the specification of charges.

Additionally, the district court has the authority to modify the discipline imposed.<sup>39</sup> The district court can independently determine what an appropriate sanction is and impose any discipline it deems appropriate.<sup>40</sup>

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<sup>33</sup> *Lewis v. Civil Serv. Comm'n of Ames*, 776 N.W.2d at 862

<sup>34</sup> Iowa Code § 400.22

<sup>35</sup> Iowa Code § 400.27

<sup>36</sup> *Id.*

<sup>37</sup> *Lewis v. Civ. Serv. Comm'n of Ames*, 776 N.W.2d at 862.

<sup>38</sup> *Rosdail v. Civil Serv. Comm'n of Cedar Rapids*, 810 N.W.2d 26, at \*2 (Iowa Ct. App. 2011). See also *Mahaffey v. Civil Service Comm'n of West Des Moines*, 350 N.W.2d 184, 185 (Iowa 1984).

<sup>39</sup> *Sieg v. Civil Service Comm'n of West Des Moines*, 342 N.W.2d 824, 828-29 (Iowa 1983)

<sup>40</sup> *Dolan v. Civil Serv. Comm'n of Davenport*, 634 N.W.2d 657, 662-63 (Iowa 2001)

In *Dolan*, the district court determined that its options on appeal were limited to either accepting the discipline imposed or rejecting it.<sup>41</sup> The Iowa Supreme Court reversed stating:

A trial de novo would also normally permit the district court to select the same remedies that were available before the commission. In the case of firefighters, the chief of the fire department may suspend, demote, or discharge a firefighter for misconduct. Iowa Code § 400.18, .19. **On appeal, the commission may then "affirm, modify, or reverse any case on its merits."** *Id.* § 400.27. Thus, the commission has the same disciplinary options as the chief. On further appeal to the district court the trial de novo takes place. *Id.* **This would normally mean the district court would have the same disciplinary options as the chief and the commission.**<sup>42</sup>

Consequently, the district court may issue any disciplinary action: warning, oral reprimand, written reprimand, or suspension it deems appropriate provided it comports with the range of sanctions the supervisor had.

In determining what discipline is appropriate, the court may also examine the employee's work record.

The only remaining issue for us to resolve is the appropriate sanction under these circumstances. In making this independent determination, we consider Dolan's prior punished acts of misconduct as well as this current incident. Additionally, we balance the evidence, if any, of extenuating circumstances mitigating the misconduct.<sup>43</sup>

Here the City and Commission determined that Hagan's escorting of Mason to the Allegiant gate violating security measures constituted misconduct under the Iowa statute. The overriding issue in this matter is whether Hagan violated any security measures when he escorted Mason to the Allegiant gate without being screened by TSA. The second issue is, if Hagan violated a security measure, did that violation(s) constitute misconduct justifying termination.

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<sup>41</sup> *Id.* at 661-62

<sup>42</sup> *Id.* at 662 (emphasis added). See also *Lewis v. Civ. Serv. Comm'n of Ames*, 776 N.W.2d at 862

<sup>43</sup> *Dolan v. Civil Serv. Comm'n of Davenport*, 634 N.W.2d at 664 (citations omitted).

In answering these questions the court was required to determine whether section 1540.105<sup>44</sup> precluded the use of the unescorted access authority provided under section 1542.211(e)<sup>45</sup> involving passengers. This determination is important because the Commission, the Airport and the Commission's expert witness, Ray White, proceed on the basic premise that unescorted access authority does not apply to escorting passengers. Their position is that the regulations prohibit this kind of escort.

Section 1540.105 clearly states that no person may do anything that may interfere with a security measure.<sup>46</sup> It also clearly states that no person may be present in the sterile area without complying with the "systems, measures, or procedures being applied to control access to, or presence or movement in, such areas."<sup>47</sup> The Commission also argued that passenger control is the province of the TSA and the responsibility of the airlines; not the Airport. Unescorted access authority was a rule designed to provide airlines, and in this case the Airport, the ability to move individuals who had business with the Airport into secured areas for the purpose of conducting their business and then leaving not for escorting passengers.

Addressing these issues it appears that TSA has control over the secured areas of an airport.<sup>48</sup> One court in addressing a personal injury claim by a passenger held that the airline no longer had control over the passenger once she entered the screening area since that area was

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<sup>44</sup> 49 C.F.R. § 1540.105

<sup>45</sup> 49 C.F.R. § 1542.211(e)

<sup>46</sup> 49 C.F.R. § 1540.105(a)(1) (in its review the court acknowledges that the Airport had local rules that essentially state similar restrictions and the court has taken those rules into consideration in its analysis without specifically referring to them here because the court believes rule 3-4 is in substance a restatement of section 1540.105 albeit not identical)

<sup>47</sup> 49 C.F.R. § 1540.105(a)(2)

<sup>48</sup> 49 C.F.R. § 1540.5



under the exclusive control of TSA.<sup>49</sup> The court further noted that “no person may [proceed beyond] the security checkpoint [] without complying with the procedures put in place by the TSA.”<sup>50</sup> The court further noted that “[n]o person, even an airline attendant, may interfere with TSA screening personnel.”<sup>51</sup> The court in reaching its conclusion noted that the “federal regulations that govern the operation of TSA security areas emphasize the exclusive control that the TSA exercises over those areas.”<sup>52</sup> Other courts hold that the TSA controls passengers and the boarding areas of the airport.<sup>53</sup> From the federal regulation and these cases it appears that TSA controls the sterile area and the movement of passengers.

However, the court does not believe part 1540 may be reviewed in a vacuum with no reference to the other regulations that comprise airport security. The regulations make this clear.

A review of the notice and preamble to these rules, when they were published, indicated that:

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<sup>49</sup> *Hogan v. Northwest Airlines, Inc.*, 11-CV-14888, 2013 WL 607852, \*3-4 (E.D. Mich. Feb. 19, 2013) (passenger brought a claim against the airline that took her to the TSA screening area where she fell and suffered injuries when she went through the screening checkpoint after she exited the wheelchair). *See also Navarez v. Am. Airlines, Inc.*, 2010 WL 5072114, \*2 (S.D.N.Y. Dec. 13, 2010) (court found in granting summary judgment to the airline in premises liability claim that screening area controlled by TSA was a federal facility and not the airlines)

<sup>50</sup> *Hogan v. Northwest Airlines, Inc.*, 2013 WL 607852 at \*3-4 *citing* 49 C.F.R. § 1540.105(a)(2)

<sup>51</sup> *Id. citing* 49 C.F.R. § 1540.109

<sup>52</sup> *Id.* at \*3

<sup>53</sup> *Elec. Privacy Info. Ctr. V. U.S. Dept. of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011) (“By statute, anyone seeking to board a commercial airline flight must be screened by the TSA . . . \* \* the agency has promulgated a blanket regulation barring any person from entering the so-called ‘sterile area’ of an airport, the area on the departure side of the security apparatus, ‘without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such area[].’ 49 C.F.R. § 1540.105(a)(2).”); *Dazell v. Chertoff*, 204CV98FTM29DNF, 2005 WL 2581017 (M.D. Fla. Oct. 13, 2005) (“no person is allowed to enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the applicable screening procedures. 49 C.F.R. § 1540.107. Additionally, no person may interfere with screening personnel in the performance of their screening duties. 49 C.F.R. § 1540.109.”)

#### **49 CFR Part 1540—Civil Aviation Security: General Rules**

New part 1540 provides rules that cover all segments of civil aviation security. It also includes rules that govern individuals and other persons. Most of the rules in part 1540 are transferred from 14 CFR parts 107, 108, and 129.<sup>54</sup>

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#### *Subpart B—Responsibilities of Passengers and Other Individuals and Persons*

This subpart contains rules that apply to many persons, including airport operators, airport tenants, aircraft operators, foreign air carriers, and indirect air carriers, as well as employees of such entities, passengers, individuals at airports, and other individuals. This subpart includes rules that apply to all entities governed by subchapter C, and includes most of the security rules that apply to individuals rather than entities.<sup>55</sup>

The preamble notes that parts 1500 to 1550 are referred to as the TSA regulations.<sup>56</sup>

Subchapter C titled Civil Aviation Security applies specifically to airport operators.<sup>57</sup>

This subchapter contains section 1542.211 the unescorted access authority in dispute here.

Under this subchapter the Airport is required to provide TSA personnel with unescorted access authority.<sup>58</sup> The Airport must adopt a security program.<sup>59</sup> That security program must include escort procedures in accordance with section 1542.211<sup>60</sup> and a description of the secured areas, sterile area, AOA and SIDA included in the security program and how movement will be controlled in each of these areas.<sup>61</sup> The Airport's security program must also include procedures and a description of facilities utilized by TSA for inspections, exclusive area agreements with aircraft operators and any airport tenant security programs.<sup>62</sup> The Airport must establish

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<sup>54</sup> Civil Aviation Security Rules, 67 FR at 8343 (Feb. 22, 2002) (emphasis added)

<sup>55</sup> Civil Aviation Security Rules, 67 FR at 8344 (emphasis added)

<sup>56</sup> Civil Aviation Security Rules, 67 FR at 8342

<sup>57</sup> 49 C.F.R. § 1542.1

<sup>58</sup> 49 C.F.R. § 1542.5(d)

<sup>59</sup> 49 C.F.R. § 1542.101(a)

<sup>60</sup> 49 C.F.R. § 1542.103(a)(9)

<sup>61</sup> 49 C.F.R. § 1542.103(a)(3-6)

<sup>62</sup> 49 C.F.R. § 1542.103(a)(14, 20 & 21)

different control measures and access authority for individuals having different unescorted access authority.<sup>63</sup>

While the Airport has these duties the airlines in their security program are responsible for insuring that every passenger has been screened by TSA at those locations where TSA is conducting screening.<sup>64</sup> The aircraft operators also have the authority to grant unescorted access authority.<sup>65</sup>

Also important in the court's analysis is part 1560 of the TSA regulations. While not implemented in 2002 with parts 1500 to 1550, these regulations went into effect on December 29, 2008 thus they were applicable at the time of the incident involved here.<sup>66</sup>

These regulations implemented the Secure Flight Program which White testified to at trial. Those regulations modified section 1540.107 by requiring that any non-traveling individual also provide certain information to the TSA before they will be allowed into the sterile area.<sup>67</sup> In addition, no individual may enter the sterile area if the individual does not present a document verifying their identity unless TSA authorizes entry on a case-by-case basis.<sup>68</sup> A non-traveling individual is defined as:

Non-traveling individual or non-traveler means an individual to whom a covered aircraft operator or covered airport operator seeks to issue an authorization to enter the sterile area of an airport in order to escort a minor or a passenger with disabilities or for some other purpose permitted by TSA. The term non-traveling individual or non-traveler does not include employees or agents of airport or aircraft operators or other individuals whose access to a sterile area is governed by another TSA requirement.<sup>69</sup>

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<sup>63</sup> 49 C.F.R. § 1542.207(a)(3) and § 1542.211(a)(1)(ii)

<sup>64</sup> 49 C.F.R. § 1544.207(b)

<sup>65</sup> 49 C.F.R. § 1540.5

<sup>66</sup> Secure Flight Program, 73 FR 64018-01, 64018 (October 28, 2008)

<sup>67</sup> Secure Flight Program, 73 FR at 64061

<sup>68</sup> Secure Flight Program, 73 FR at 64061

<sup>69</sup> Secure Flight Program, 73 FR at 64062 (49 C.F.R. § 1560.3)

The requirements of part 1560 are applicable to airports if they intend to allow non-traveling individuals to enter the sterile area.<sup>70</sup> Section 1560.111 requires the airport to comply with part 1560 if they have a program that allows non-traveling individuals to enter the sterile area.

While airport operators and aircraft operators have to develop escort procedures the regulations do not indicate who may be escorted and into what areas of the airport they may be escorted, except as provided in part 1560.<sup>71</sup> The regulations do provide that the area into which a person may be escorted is dependent upon the unescorted access authority the person has that is conducting the escort.

However, there is no specific regulation that states a passenger may not be escorted into the sterile area. What the regulation provides is that:

No person may . . . [e]nter, or be present within, a . . . sterile area without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such areas.<sup>72</sup>

On March 18, 2011 Mason was in the sterile area because Hagan exercised the unescorted access authority he was trained to perform under a TSA approved security program which controlled the presence and movement of individuals in this area.

In order for the court to find that Hagan violated section 1540.105 the court would have to ignore section 1542.211. The court cannot do so. The preamble and notice for these TSA regulations indicate that they provide a comprehensive system of regulations that control security

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<sup>70</sup> Secure Flight Program, 73 FR at 64605 (49 C.F.R. § 1560.111) (“This section applies to a covered airport operator that has a program approved by TSA through which the covered airport operator may authorize non-traveling individuals to enter a sterile area.”)

<sup>71</sup> These were the only regulations that provided a process by which a non-traveling individual could enter the sterile area. This part of the regulations concerned a non-traveling individual not a person like Mason.

<sup>72</sup> Joint Exhibit 19 at 3

at an airport, consequently, the regulations need to be reviewed together and harmonized to give each regulation effect.

If section 1540.105 is read literally the person who has unescorted access authority for the sterile area cannot enter the sterile area because it states no person may enter “without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such areas.”<sup>73</sup> This last portion of the regulation has to mean individuals who have unescorted access authority may escort individuals into the sterile area otherwise the escort procedure is meaningless. This is consistent with the court’s role in interpreting statutes or regulations.<sup>74</sup>

While the TSA regulations provide different functions or duties for different entities involved in aviation security the individual regulations cannot be analyzed without examining all sections which are applicable. Consequently, the court cannot ignore the impact of section 1542.211 in this analysis. It has a purpose and while the Commission argues it is clear that section 1542.211 does not involve passengers the language of the rule clearly does not so state.<sup>75</sup>

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<sup>73</sup> 49 C.F.R. § 1540.105(a)(2)

<sup>74</sup> *Messina v. Iowa Dept. of Job Serv.*, 341 N.W.2d 52, 56 (Iowa 1983) (“In the interpretation of statutes, all relevant legislative enactments must be harmonized, each with the other, so as to give meaning to all if possible. \* \* \* Generally, the rules of statutory construction and interpretation also govern the construction and interpretation of rules and regulations of administrative agencies.”) (citations omitted); *Iowa S. Utilities Co. v. Iowa State Commerce Comm’n*, 372 N.W.2d 274, 277-78 (Iowa 1985) (“We presume that the entire statute is intended to be effective and that a reasonable result is intended. Iowa Code § 4.4(2), (3). We consider all parts of the statute together, without attributing undue importance to any single or isolated portion.”); Iowa Code § 4.4(2 & 3).

<sup>75</sup> *Birchansky Real Estate, L.C. v. Iowa Dept. of Pub. Health, State Health Facilities Council*, 737 N.W.2d 134, 139 (Iowa 2007) (“If the statute’s language is clear and unambiguous, we apply a plain and rational meaning consistent with the subject matter of the statute.”)

Also critical in the court's decision are the actions and statements of the TSA in this matter. While no TSA representative testified the court finds that their statements in the exhibits admitted into the record are instructive for the court's analysis.

The TSA conducted an investigation into this incident. They examined the actions of the Airport and Hagan. With regard to the Airport their concern focused on the Airport's training for those granted unescorted access authority. In their letter of investigation they informed the Airport that they were concerned about the Airport's violation of 49 C.F.R. section 1542.211(e)(5).<sup>76</sup> Specifically, the TSA wrote:

The Transportation Security Administration (TSA), Des Moines, Iowa, Office of Aviation Security Compliance, is investigating an alleged violation of Transportation Security Regulations (TSR). In particular, 49 C.F.R. 1542.211(e)(5) which requires that each airport operator establish and implement procedures for escorting individuals who do not have unescorted access authority to a secured area or SIDA. Such procedures must ensure that such individuals escorted into a sterile area without being screened remain under escort until they exit the sterile area, or submit to screening.<sup>77</sup>

The court finds this instructive because TSA does not indicate that they are investigating the Airport's actions because its employee took a passenger into the sterile area which was a violation of sections 1540.105 or 1540.107. It appears that TSA did not see this as a violation of those sections.

In addition, the initial violation TSA referenced was that Hagan "did not maintain positive control of Mr. Mason."<sup>78</sup> The TSA went on to state that:

This incident represents an alleged failure of DSM to establish and implement adequate escort procedures. In particular, it is alleged that DSM failed to establish and implement procedures requiring that unscreened escorts who do

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<sup>76</sup> Joint Exhibit 11 at 1

<sup>77</sup> Joint Exhibit 11 at 1

<sup>78</sup> Joint Exhibit 11 at 1

not have unescorted access authority to a secured area or SIDA remain under escort until they exit the sterile area, or submit to screening.<sup>79</sup>

If the regulations prohibited the escort of a passenger into the sterile area it does not seem important whether the employee implemented the proper escort procedure under section 1542.211 or whether the Airport had a proper training program.

The Airport's response is also instructive. The Airport stated that: "Although this employee may have failed to follow proper procedures when escorting a passenger into the SIDA/Secured or Sterile Area, we do not agree with the allegation that DSM failed to 'establish and implement' procedures requiring that unscreened persons be properly escorted in the SIDA/Secured Area."<sup>80</sup> The Airport did not state Hagan failed to comply with sections 1540.105 or 1540.107. They simply stated that he may not have followed "the proper procedures for *escorting a passenger into the SIDA/Secured or Sterile Area*" indicating that the Airport believed a passenger could be escorted into the sterile area. The Airport went on to state that:

DSM has not failed to 'establish and implement procedures for escorting individuals who do not have unescorted access authority to a secured area or SIDA.' Any violation of federal security requirements that may have occurred during this incident were the result of the employee's failure to comply with the requirements for which he was trained, as prescribed and approved by TSA within the DSM Airport Security Program, Sections 5, 11, and Appendix 08.<sup>81</sup>

In responding the Airport never indicated that Hagan violated sections 1540.105 and 1540.107. They stated he violated the procedures under which he was trained for escorting individuals suggesting that escorting passengers was a permitted activity.

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<sup>79</sup> Joint Exhibit 11at 2

<sup>80</sup> Joint Exhibit 11at 3

<sup>81</sup> Joint Exhibit 11at 4

TSA ultimately concluded that the Airport adequately trained Hagan and that their DSM Airport Security Program (“ASP”) met the federal requirements.<sup>82</sup> The ASP was never entered into the record here and apparently was never provided to counsel for Hagan or counsel for the Commission during the discovery process since it is deemed to be sensitive security information. The court cannot determine if the ASP distinguished between passengers and non-passengers in its escort procedures thus the court makes the reasonable inference that the ASP did not distinguish between passengers and non-passengers or else this distinction probably would have been offered by the Commission.<sup>83</sup>

The court also finds instructive the TSA’s investigation of Hagan’s actions. In the investigation of Hagan the TSA did reference section 1540.105 but not section 1540.107. Specifically the TSA noted that they were investigating whether a violation of section 1540.105(a)(1) occurred.<sup>84</sup> They went on to state: “DSM has measures and procedures in their Airport Security Program (ASP), implemented under the relevant subchapter, concerning Sterile Area Escort.”<sup>85</sup> They did not find that Hagan violated section 1540.105(a)(1) by escorting a passenger into the sterile area. Instead, the TSA stated that: “The incident *may* have represented a failure on your part to comply with 49 C.F.R. § 1540.105(a)(1) and the Sterile Area Escort requirements implemented by DSM, as described above.”<sup>86</sup> The TSA then concludes that because of Hagan’s “positive security attitude subsequent to the incident we have elected to send

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<sup>82</sup> Joint Exhibit 11 at 5

<sup>83</sup> The court prior to trial agreed to closing the trial because of some of the security sensitive information that was presented to the court and various testimony and exhibits were sealed for the same reason. The portion of the ASP that concerned escort procedures could have been kept confidential under the same orders. *See e.g., Johnson v. Kinney*, 232 Iowa 1016, 1025-26, 7 N.W.2d 188, 193-94 (1942) (“It is legitimate to comment upon failure of the opposing party to produce testimony within his control.”); *Tice v. Mandel*, 76 N.W.2d 124, 138 (N.D. 1956)

<sup>84</sup> Joint Exhibit 17 at 1

<sup>85</sup> Joint Exhibit 17 at 1

<sup>86</sup> Joint Exhibit 17 at 1



you this Warning Notice rather than seek a Civil Penalty.”<sup>87</sup> The TSA’s conclusion only states that he may not have complied with the Sterile Area Escort requirements. They do not conclude that because Mason was a passenger the escort was a violation of federal law.

Further the court finds instructive the Airport’s adoption of rule 7-5 after this incident. That rule specifically stated that a passenger intending to board an aircraft could not be escorted into the sterile area. This further solidifies the court’s conclusion that the Airport’s ASP (and thus its training program) did not distinguish between escorting passengers and non-passengers in the sterile area on March 18, 2011.

The Airport’s escort procedures as defined by their practice do not suggest that passengers cannot be escorted. The escort procedures at the Airport, as demonstrated by the evidence, indisputably allowed the escorting of individuals who were not screened into the sterile area where they may come in contact with passengers who have gone through the screening process thus creating situations where they could contaminate the area by providing some unauthorized material to a passenger. This possibility was what made the gravity of Hagan’s actions so severe in the eyes of the Airport and Commission. The evidence also indisputably demonstrated that an escort may need to undertake tasks that would require the escort to remove his sight on escorted during the escort. There was no immediate violation in those situations. Also the evidence demonstrated that escorted could carry items into the sterile area that were not screened and this was not deemed an immediate violation of the regulations. While the escorting of a passenger around the screening checkpoint might raise a higher level of concern there does not appear to be a violation unless the escort attempted to allow the escorted to board a plane without ever being screened.

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<sup>87</sup> Joint Exhibit 17 at 2

In this case the Commission failed to prove that Hagan's intention was to allow Mason to board the Allegiant aircraft without a boarding pass or without going through screening. Mason emphatically testified that Hagan told him that his intent was to facilitate him obtaining a boarding pass and have him proceed through screening thereafter. The court finds that the evidence presented by the Commission failed to establish that Hagan's intent was to allow Mason to board the Allegiant aircraft without going through screening. Nor did the Commission prove that Hagan believed it was illegal for him to escort Mason in the manner he did and did so only because he knew him and perceived him not to be a security threat. The court finds that Hagan's testimony and his actions more credible on this issue than the conclusions reached by the Airport and Commission.

In addition, the surveillance footage was consistent with Hagan's testimony and Mason's. It demonstrated that Hagan walked to the Allegiant gate agent and discussed the situation with him after which a boarding pass was provided and that Mason ultimately went through screening. Furthermore, the TSA investigation did not conclude that Hagan's intent was to place Mason on the plane without screening.

A review of the evidence demonstrates overwhelmingly that there was no credible evidence to suggest that Hagan had any intention to circumvent the security system except the Airport's subjective fear that his intention was wrong. For all of these reasons, the court finds that sections 1540.105 1540.107 do not prohibit a person with unescorted access authority from escorting a passenger into the sterile area. Consequently, the court finds that the Commission failed to carry its burden that Hagan violated sections 1540.105, 1540.107 or Airport Rule 3-4.<sup>88</sup>

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<sup>88</sup> Likewise, Hagan did not disrupt Allegiant's responsibility to ensure that Mason did not board without going through screening. The surveillance footage demonstrates there was no attempt to circumvent that process and the Allegiant agent was not presented to the court to state otherwise.

The next issue the court must address is whether Hagan violated section 1542.211. The Airport in its investigation concluded that Hagan failed to comply with the “sight and sound” standard<sup>89</sup> and section 1542.211(e)(2).

The court finds the TSA findings likewise instructive here. The TSA does not find that Hagan violated the escort procedure under section 1542.211. They state that the “incident *may* have represented a failure on [Hagan’s] part to comply.”<sup>90</sup>

The Airport in its investigation concluded that Hagan failed to comply with the “sight and sound” standard and section 1542.211(e)(2).<sup>91</sup> On this point, the court finds that the Commission failed to prove that Hagan violated section 1542.211(e)(2). The evidence established that Hagan continuously monitored and accompanied Mason throughout his escort. The few moments that Hagan may have had his back to Mason do not create violations of the requirement to continuously monitor and accompany. The evidence was undisputed that a person with unescorted access authority did not violate the continuous monitoring and accompanying portion of the regulation when he took his eyes off the escorted to open a door and no violation if a cameraman was behind the person conducting the escort while the interviewer was in front. The

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<sup>89</sup> Joint Exhibit 9 at 3 (The court’s concern is whether the Airport can rely on this training slide as an enforceable standard or rule since it was contained only in a training slide. It is not part of the Airport’s rules and it is not contained in the federal regulation. However, Hagan did admit that he understood this was a standard the Airport expected as a result of his training. The court will consider it as means to explain the federal regulation’s requirement of continuously accompanying and monitoring the escorted individual since this was what the Airport intended it to be; a method to explain the federal regulation requirement.)

<sup>90</sup> Joint Exhibit 17 at 1(emphasis added)

<sup>91</sup> Joint Exhibit 9 at 3 (The court has concerns whether the Airport can rely on this training slide as an enforceable standard or rule since it is contained only in a training slide. It is not part of the Airport’s rules and it is not contained in the federal regulation. However, Hagan did admit that he understood this was a standard the Airport expected as a result of his training. The court will consider it as means to explain the federal regulation’s requirement of continuously accompanying and monitoring the escorted individual since this was what the Airport intended it to be a method to explain the federal regulation requirement.)

evidence further demonstrated that the person conducting the escort might be escorting a group which would preclude viewing each individual at the same time. The regulation requires that the person conducting the escort continuously accompany and monitor the person(s) being escorted to ensure they not “engage in activities other than those for which escort access was granted”<sup>92</sup> and be able to take appropriate action if that occurred.

As to the latter, the FAA’s response to comments on the definition of “escort” when this rule was adopted and clarified is instructive as to what an escort must do:

This emphasizes the primary function of the escorter—to determine whether the escorted is limiting his or her activities to those authorized. If the escorted departs from authorized activities, the escorter would take action in accordance with the security program. This could include verbally challenging the individual, summoning a supervisor, or summoning law enforcement. The minimum requirements for the local design and implementation of escort procedures are set forth in new §§107.201 and 107.205. Specifics as to where and how this method is to be applied will appear in individual airport security programs.<sup>93</sup>

The court finds that Hagan did continuously accompany and monitor Mason and Hagan’s actions allowed him to react if mason acted improperly. The court comments that Hagan could have modified his actions differently which would have given him better control when he approached the Allegiant gate with regard to have his back to Mason. Hagan could have walked side by side provided spacing allowed this.

Also Hagan could have had Mason walk with him to the Allegiant gate rather than leave him standing back by the passengers. The passengers at the counter were behind the stanchions

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<sup>92</sup> 49 C.F.R. § 1542.211(e)(2)

<sup>93</sup> Airport Security, 66 FR 37274-01, 37280 (July 17, 2001) (at this time TSA had not been created and airport security was under the control of the FAA); Airport Security, 66 FR 3717-18, 14 C.F.R § 107.3 (eff. Nov. 14, 2001) (“Escort means to accompany or monitor the activities of an individual who does not have unescorted access authority into or within a secured area or SIDA.”); *Compare* 14 C.F.R. § 107.3 with 49 C.F.R. § 1540.5 (Section 107.3 is identical to section 1540.5 found in today’s rule.)

and belt so they were segregated from Hagan and Mason. Hagan could have positioned himself between the passengers and Mason as he walked to the Allegiant counter to further separate Mason from the passengers. While these actions would alleviate the concerns expressed by the Commission as to why they felt it was a violation of the escort rule, the court does not find that the escort was a clear violation of section 1542.211(e).

Even if the court found that Hagan's actions during the escort constituted a violation of section 1542.211(e) at the Allegiant gate, the court finds that the disciplinary action taken by the Airport and affirmed by the Commission inappropriate in light of the circumstances. The record is undisputed that Hagan was a good employee of the Airport. His evaluations and the testimony of his coworkers demonstrated that there was no intent by Hagan to act contrary to the airport's security program or to intentionally cause harm or inconvenience to any passenger. The federal regulation and the Airport's "sight and sound" standard do not provide bright line tests. The court likewise finds that the evidence did not establish that Hagan took it upon himself to circumvent any TSA decision-making knowing that his actions violated a federal regulation. His supervisor, Criss, did not support termination. McCoy made no recommendations. Smithey recognized that there were options available to him short of termination. The TSA found that Hagan had a positive security attitude and issued only a warning.<sup>94</sup> Accordingly, the court finds that Smithey's action of terminating Hagan is not supported by the evidence and any disciplinary

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<sup>94</sup> The Commission argued and presented testimony that TSA considered the Airport's actions in terminating Hagan as a basis for their decision-making, however, there is no competent or admissible evidence that suggests TSA did take that into consideration in rendering their decisions. The evidence could be construed in that they did not consider since they indicated to Hagan that another violation could result in more severe action suggesting they were unaware that he had been terminated. The court finds that there is no evidence to support a conclusion that the TSA rendered their decisions based upon Hagan's termination.

action that was imposed should been more akin with options 1 and 2 that Smithey discussed with Criss prior to termination or some other appropriate reprimand or further training.

As a result the court finds that the decision of the Commission is reversed. This matter is remanded to the Commission to enter an order requiring the City to reinstate Hagan to a position that is comparable to the position he held at the Airport and at a salary that is comparable to what he would be paid presently had he not been terminated. In addition, the Commission shall order the City to compensate Hagan for the backpay he lost from the date of his termination to the time he is reinstated. Costs of this action are taxed against the Commission.

**IT IS SO ORDERED** this 25<sup>th</sup> day of March, 2013.

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Lawrence P. McLellan  
Judge-Fifth Judicial District of Iowa

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